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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ISAAC LEE, RANDY STEWART, DAVID RYBOLT, DANNY HILL, FLOYD WILLIAMS AND DUDLEY LESTER, *PETITIONERS*

VERSUS

COAHOMA COUNTY, MISSISSIPPI AND JESSE D. BONNER, *RESPONDENTS*

Petition for Writ of *Certiorari* to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Is the "fluctuating work week" method of calculating the regular rate and overtime compensation appropriate when there is no agreement and/or understanding between the employer and employee as regards how many hours would be covered by the wages paid?

LIST OF PARTIES

Petitioners Isaac Lee, Randy Stewart, David Rybolt, Danny Hill, Floyd Williams and Dudley Lester were the plaintiffs/appellants in the proceeding below. Respondents Coahoma County, Mississippi and Jesse D. Bonner were the defendants/appellees in the proceeding below.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ISAAC LEE, RANDY STEWART, DAVID RYBOLT, DANNY HILL, FLOYD WILLIAMS AND DUDLEY LESTER, PETITIONERS

VERSUS

COAHOMA COUNTY, MISSISSIPPI AND JESSE D. BONNER, RESPONDENTS

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Isaac Lee, Randy Stewart, David Rybolt, Danny Hill, Floyd Williams and Dudley Lester, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the U. S. District Court for the Northern District of Mississippi wherein the "fluctuating work week" method of calculating overtime compensation was used where no agreement and/or understanding existed between the employer and the employee regarding the use of that method.

OPINIONS BELOW

The original unpublished opinion of the U.S. District Court appears in Appendix A. The initial opinion of the Court of Appeals is reported as *Lee, et al v. Coahoma County, Ms., et al,* 937 F.2d 220 (5th Cir. 1991), and appears in Appendix B to this Petition. The unpublished written opinion (on remand) and the revised unpublished written opinion (on remand) of the United States District Court for the Northern District of Mississippi appears in Appendix C and D respectively. The unpublished affirmation (without opinion) of the Court of Appeals affirming the District Courts judgment appears in Appendix E to this Petition.

JURISDICTION

The Court of Appeals' affirmation of the District Court's Opinion was filed on November 1, 1994. A timely Petition for Writ of Certiorari to the United States Supreme Court has been filed. This Court's jurisdiction is invoked pursuant to Title 28, U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 207 is set forth in Appendix E. Title 29, Code of Federal Regulations (C.F.R), Section 778.114 (Rev. 7/1/87) is set forth in Appendix D.

STATEMENT OF THE CASE

The United States District Court, Northern District of Mississippi, had jurisdiction pursuant to Title 29, U.S.C. § 216(b). On April 14, 1988, Plaintiffs filed suit in the said District Court of the Northern District of Mississippi claiming they were due unpaid overtime compensation.

On July 28, 1989, the District Court ruled in favor of the Plaintiffs for unpaid overtime. However, the Court denied the Plaintiffs' claim for liquidated damages and held that certain time periods (rest and meal periods) were not compensable.

By Judgment dated August 5, 1991, the Fifth Circuit Court of Appeals ruled that the District Court had improperly disallowed certain rest periods from being considered compensable time and provided the District Court a formula for determining the amount of overtime compensation due. (See Appendix B, p. B9, ftnt. 2)

By Judgment filed October 21, 1992, the District Court recalculated the overtime compensation due, awarded the deputies overtime pay at the full "1.5 x regular rate" for all overtime hours and entered its order accordingly. (See Appendix C)

By Judgment dated May 20, 1993, the District Court revised its ruling and recalculated the overtime compensation due at ".5 x regular rate" for all overtime hours up to 245 hours and re-entered its order. (See Appendix D) This method of

calculation is found in 29 C.F.R. § 778.114(a).

Claiming that the District Court had not followed the Fifth Circuits formula in calculating the overtime compensation due and objecting to the method by which the District Court calculated the overtime compensation, the Plaintiffs again appealed the District Courts decision to the Fifth Circuit Court of Appeals. Petitioner argued before the Court of Appeals for the Fifth Circuit on October 31, 1994. On November 1, 1994, the Fifth Circuit affirmed the District Court's judgment without opinion. (Appendix E)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because the issue presented is an important issue of federal law that has not been, but should be, decided by this Court.

FACTS

To impart a basic understanding of the context within which this issue is presented, a brief summary of pertinent facts as found by the District Court is needed:

1. At all relevant times, the Plaintiffs were employed by and worked as Deputy Sheriffs for Coahoma County, Mississippi. (Appendix A - pp. A1-A2)

2. Prior to coverage under the Fair Labor Standards Act, the deputies received

a fixed monthly salary. (Appendix A - p. A7)

3. After coverage under the Fair Labor Standards Act, the Chancery Clerk and Sheriff devised a plan which compensated each deputy for 171 hours straight time and 74 hours overtime (245 total hours) in a 30-day period. (Appendix A - p. A3) This plan was deemed "budget neutral" since it resulted in very little, if any, increase in the wages actually paid to the deputies. (Appendix A - p. A2; Appendix C - p. C4)

4. Regardless of the number of hours actually worked by each deputy, each month the sheriff reported to the county pay clerk that the deputies had worked 171 hours straight time and 74 hours overtime (245 total hours) pursuant to the plan devised by he and the clerk, (Appendix A - p. A3) and the deputies received the same fixed compensation each month.

5. There was no agreement or understanding between the deputies and their employer as to how many hours, regular or overtime, were to be covered by the salary. (Appendix C - pp. C12-C13; Appendix D - p. D1)

6. The deputies worked a 28-day work period. (Appendix C - p. C4)

7. The formula for calculating the regular rate and overtime compensation proposed to be used in this case is as follows:

1. Monthly salary x 12 months = yearly salary;

2. Yearly salary ÷ by 13 pay periods = 28-day work period compensation;

3. 28-day work period compensation ÷ by total hours worked by deputy per that work period = regular hourly rate;

The overtime rate is to be calculated as follows:

1. .5 x regular hourly rate for hours in excess of 171 per 28-day work period.

2. 1.5 x regular rate for hours in excess of 245 per 28-day work period. (Appendix D - p. D3)

DISCUSSION

Although not cited as such in the District Court's Opinion,the proposed formula is the same as found in 29 C.F.R. § 778.114(a) entitled the "Fixed salary for fluctuating hours". This section (29 C.F.R. § 778.114) allows the employer to treat a "salary" as compensation for all hours worked - including overtime hours, and then authorizes payment of an additional half-rate for all overtime hours. While the Court has implied its approval of this method, *Condo v. Sysco Corp.*, 1 F.3rd 599 (7th Cir. 1993); cert. denied, 114 S. Ct. 1051, 127 L.Ed 2nd 373 (1994), this section has never been used or approved where there was no prior agreement or understanding between the parties as to its use. The one feature of this case distinguishing it from any other wage and

hour/overtime case heretofore presented and eliminating the use of 29 C.F.R. 778.114 is that the District Court ***specifically*** found that there was no agreement or understanding between the deputies and their employer concerning how many hours, regular or overtime, were to be covered by the wages paid.

To allow the use of 29 C.F.R. 778.114 when there was no agreement or understanding that such a method would be used for calculating overtime is in direct conflict with the plain language of the section:

> (a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a work week, whether few or many. Where there is a ***clear mutual understanding*** of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those

> workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. 29 C.F.R. 778.114(a)

The plain language of the section requires that before this method is used, a "clear mutual understanding" exist between the parties that the compensation paid is for all hours worked, few or many, and the overtime hours will be paid at a half-rate. In the case at bar, the district court specifically found that no agreement and/or understanding existed between the parties, and therefore, this method of calculation of overtime compensation cannot be used.

This Court should grant certiorari here to specifically rule that the method of computing the regular rate and overtime compensation found in 29 C.F.R. § 778.114 only applies in those instances where there is a ***clear mutual understanding*** between the employer and employee regarding the number of hours which are covered by the wages paid.

CONCLUSION

For the reason set forth above, a Writ of Certiorari should issue to review the judgment and opinion of the United States District Court for the Northern District of Mississippi as affirmed by the Fifth Circuit Court of Appeals.

DATE: 1/18/95

Respectfully submitted,

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APPENDICES

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ISAAC LEE, ET AL.,	)	
	)	
Plaintiffs	)	
V.	)	NO. DC88-56-B
	)	
COAHOMA COUNTY, MS, ET AL.,	)	
	)	
Defendants	)	

MEMORANDUM OPINION

The court has before it the plaintiffs' claims for unpaid overtime, liquidated damages and attorney's fees which the plaintiffs seek for the defendants' alleged violation of the Fair Labor Standards Act. Having considered the evidence presented at trial, the parties memoranda, and being fully advised of the premises, the court is ready to rule on the merits of the plaintiffs' claims.

Findings of Fact

1. The plaintiffs, Isaac Lee, Randy Stewart, Billy Webb, David Rybolt, Danny Hill, Floyd Williams, Dudley Lester, and Sammy Flowers, served as deputy sheriffs in Coahoma County, Mississippi during the following dates:

Plaintiff	Hire Date	Termination Date
Samuel Flowers	08/01/78	09/16/86
Isaac Lee	01/01/75	still employed
Danny Hill	07/10/78	still employed
Floyd Williams	11/01/81	still employed

Billy Webb	06/01/74	still employed
Randy Stewart	10/01/85	still employed
David Rybolt	12/08/86	11/20/87
Dudley Lester	08/01/85	10/86

2. In February, 1985, the Supreme Court ruled that Congress had the authority to apply the Fair Labor Standards Act (FLSA) to local governments. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed. 2d 1016 (1985). Congress amended the FLSA in 1985 to require local government to comply with the FLSA by April 15, 1986.

3. After the Garcia decision, the Mississippi Attorney General notified the Coahoma County Board of Supervisors that it would be subject to the FLSA and the county attorney notified the county department heads similarly in a March 20, 1985 memorandum.

4. The county attorney examined the FLSA and determined that deputy sheriffs would qualify as employees under the section 7(k) exemption pursuant to 29 C.F.R. 553.230. The county attorney believed the county could pay its deputies regular pay for 171 hours of work and overtime pay for work exceeding 171 hours in a pay period consisting of 28 days.

5. The county attorney called the Department of Labor in Washington, D.C. and asked whether the county could utilize the 7(k) exemption, reduce the deputy's hourly wages to keep within the current county budget and still comply with the FLSA. An employee with the Department of Labor told the county attorney the plan seemed to comply with the FLSA.

6. Thereafter, the county attorney told the Coahoma County Chancery Clerk and Sheriff to devise a plan following these goals.

7. The chancery clerk and sheriff devised a plan which would compensate each deputy 171 hours straight pay and 74 hours overtime pay in a 30-day period.

8. Instead of scheduling the deputies' shifts according to the plan and reporting the actual hours the deputies worked, the sheriff reported to the county pay clerk his estimate that the deputies had worked 171 hours straight time and 74 hours overtime. The sheriff testified that he believed he had complied with the FLSA.

9. In November, 1987, the plaintiffs' attorney notified Coahoma County's attorney that the plaintiffs were dissatisfied with their overtime compensation.

10. In December, 1987, Coahoma County officials realized that the deputies had not adequately been compensated for overtime hours they had worked and Coahoma County asked the plaintiffs' attorney how much the county owed its deputies.

11. Without providing the county a response, the plaintiffs filed this suit.

12. The county made several inquiries, including two motions to compel, to ascertain the amount the plaintiffs claimed, and the county tendered the plaintiffs unconditional checks on two occasions prior to trial.

13. Only one deputy, Billy Webb, accepted a check as payment for full back pay, and the remaining plaintiffs proceeded to trial.

14. At trial the parties agreed to most of the actual hours the plaintiffs had worked. The parties could not agree as to the plaintiffs' compensation for meal times and weekend rest breaks.

15. The deputies' primary duty entailed patroling in an automobile. The patrol automobile was also used to travel

to lunch by the deputies. When the deputies arrived at the luncheon location, they would "clock out" with the sheriff's dispatcher via their car radio.

16. The sheriff limited the deputies to a maximum of two deputies at a meal site and required the deputies to report the phone number of their location.

17. On occasion, the deputies might be called from lunch to perform emergency service. Otherwise, the deputies were free to do what they wished during the 20-minute meal period.

18. The county refused to pay the deputies for the twenty-minute meal break the deputies took to eat lunch and for a two and one-half to three hour break the deputies took during a "long shift" on weekends.

19. The plaintiffs claim that they were expected to respond to emergencies during these brakes and, thus, were "on call".

20. The plaintiffs also argue that 29 C.F.R. § 553.223 (1986) required the county to compensate the deputies for meal times.

21. Accordingly, the court must resolve the following issues to determine Coahoma County's liability to the plaintiffs:

A. Whether the deputies' meal times and rest breaks were compensable;

B. Whether Coahoma County attempted to comply with the FLSA in good faith; and

C. Whether the plaintiffs are entitled to attorney's fees.

Conclusions of Law

A. Compensation for Meal Times and Rest Breaks

22. Bona fide meal periods are not considered compensable:

> These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.

29 C.F.R. 785.19 (1988).

23. An employee who cannot use the meal period for his own purposes is working while on call. "An employee who is not required to remain on his employer's premises, but is merely required to leave word at his home or with company officials where he may be reached, is not working while he is on call." 48A Am. Jur. 2d Labor and Labor Relations § 2271 (1979); see also 24 C.F.R. 785.17 (1988).

24. In a June 6, 1985 wage and hour opinion letter, the Wage and Hour Administration explained that § 553.15 does

not require compensation for bona fide meal periods. Thus, the regulation does not resolve the issue of compensation for meal times as the plaintiffs contended. Lab. L. Rep. (CCH) # 43.781 (Sept. 13, 1985).

25. Because the county compensated the deputies for the time it took the deputies to travel to their meal site and because the deputies were called to work during lunch only in an occasional emergency, the court finds the meal break was primarily for the deputies' benefit. Thus, the plaintiffs are not entitled to compensation for the 20-minute meal breaks. See 48A Am.Jr.2d § 2263 (1979).

26. Similarly, during their two and a half to three hour rest breaks on the weekend "long shifts," the deputies were free to go where they wished and simply required to leave a phone number where they could be reached. Accordingly, the court finds the plaintiffs are not entitled to compensation for the weekend rest periods.

B. Liquidated Damages

27. An employer may be liable for an award of liquidated damages for violating the FLSA. 29 U.S.C. 216 (Supp. 1989). However, "if the employer shows to the satisfaction of the court that the act or omission was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act...the court may in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title." 29 U.S.C.A. 260 (1985).

28. Several factors lead the court to the conclusion that Coahoma County attempted to comply with the FLSA in good faith:

(a) the county sought the advice of its attorney and relied on him to initiate action to comply with the FLSA;

(b) the county attorney devised a plan and consulted with the Department of Labor to help the county comply with the FLSA;

(c) when the county initially learned of the plaintiffs' claim for overtime, it offered to pay the plaintiff the back wages it owed plus interest. The county also tendered the plaintiffs unconditional checks on two occasions prior to trial.

29. Accordingly, the court finds that the defendants acted in good faith in attempting to comply with the FLSA and the court will not assess the defendants with an award of liquidated damages.

Remedy

30. Since plaintiffs received a fixed monthly salary, the first step in determining their regular rate of pay is to determine their weekly wage. 29 C.F.R. § 778.113(b).

31. The weekly wage is determined by multiplying the monthly salary by the twelve months in a year and then dividing by the 52 weeks in a year. Id.

32. The weekly wage is then divided by the number of hours the wage is intended to compensate. Id. Accordingly, the intended hours of compensation in a work week is determined by multiplying 245, the number of hours worked each month, by 12, the number of months in a year, and then dividing by 50, the number of weeks the deputies worked each year.

33. Applying the above formula to the stipulated salaries of the deputies, the deputies' regular rate of pay was as follows:

Deputy	Dates	Amount
Isaac Lee	4/15/86-9/30/87	$5.32
	10-/1/87-12/31/87	$5.58
Sammy Flowers	4/15/86-8/24/86	$5.54
Dudley Lester	4/15/86-10/19/86	$3.99
Randy Stewart	4/15/86-5/31/86	$3.99
	6/1/86-9/31/87	$4.54
	10/1/87-12/31/87	$4.77
Danny Hill	4/15/86-9/31/87	$5.32
	10/1/87-12/31/87	$5.88
Floyd Williams	4/15/86-4/31/86	$4.32
	5/1/86-9/31/87	$4.54
	10/1/87-12/31/87	$4.77
David Rybolt	12/8/86-9/31/87	$4.54
	10/1/87-11/22/87	$4.77

34. As the court previously noted, the parties stipulated to the amount of time the deputies worked. Based upon that stipulation and the court's determination of compensation for rest periods and meal breaks, the plaintiffs are entitled to the following amounts of back pay:

Deputy	Amount
Isaac Lee	$2,589.06
Sammy Flowers	$ 695.39
Dudley Lester	$ 739.06
Randy Stewart	$2,944.18
Danny Hill	$2,728.15
Floyd Williams	$2,685.41
David Rybolt	$1,446.46

Attorney's Fees

35. A successful FLSA claim carries with it the recovery of attorney's fees. 29 U.S.C. § 216(b)." Diaz v. Robert Ruiz, Inc., 808 F.2d 427 (5th Cir. 1987). Since the plaintiffs recovered back overtime wages in this action, they are entitled to reasonable attorney's fees. The plaintiffs shall submit their proof of attorney's fees incurred in this action within ten days from the entry of this opinion. The

defendants may respond to the amount of fees the plaintiffs' claim within ten days after receipt of the plaintiffs' proof of attorney's fees.

An order will issue accordingly.

THIS, the 28th day of July, 1989.

/s/
JUDGE NEAL B. BIGGERS, JR.
United States District Judge

B1

Isaac LEE, et al., Plaintiffs-Appellants, Cross-Appellees,
v.
COAHOMA COUNTY, MISSISSIPPI, et al., Defendants-Appellees Cross-Appellants.
No. 90-1122.

United States Court of Appeals,
Fifth Circuit.
Aug. 5, 1991.

Before CLARK, Chief Judge, RONEY* and DUHÉ, Circuit Judges.

CLARK, Chief Judge:

I.

Isaac Lee, Sammy Flowers, Dudley Lester, Randy Stewart, Danny Hill, Floyd Williams and David Rybolt seek to appeal the district court's award of compensatory damages pursuant to § 7(k) of the Fair Labor Standards Act (FLSA). They also would contest the district court's award of attorney's fees. Coahoma County cross appeals from the district court's award of attorney's fees. We conclude that this court possesses jurisdiction over the appeals of the deputies, and we affirm in part, reverse in part, vacate the district court's order granting attorney's fees and remand for further proceedings.

II.

All appellants in this case were employed by the Coahoma County Sheriff's Department as deputies. After the Supreme Court's decision in *Garcia v. San Antonio Metro Trans. Auth.*, 469 U.S. 528, 105

*Circuit Judge of the Eleventh Circuit, sitting by designation.

S.Ct.1005, 83 L.Ed.2d 1016 (1985), established that local governments were employers under the FLSA, the County concluded that the then existing method of calculating deputies' compensation violated the FLSA. The County's counsel, after attending a seminar on the FLSA, devised a compensation plan to take advantage of the § 7(k) exemption to the FLSA. The plan involved changing the deputies' compensation from a salary base to a wage basis and adjusting the hourly rate to be paid to each employee. This plan allowed the County to pay the deputies substantially the same compensation as before. Sheriff Bonner estimated that each deputy worked approximately 245 hours per month with 171 hours of straight time and 74 hours of overtime. Each month, Sheriff Bonner would turn in time sheets indicating that each employee had worked 171 hours and 74 hours overtime. The Sheriff kept no records detailing the actual hours each deputy worked. It was admitted that the hours shown in the time sheets bore no relation to the true number of hours worked. The Sheriff informed some of the deputies that their pay scale was being altered. He testified that he did not know that the FLSA required accurate records be kept. The chancery clerk testified that he knew the FLSA required overtime be computed on interval of 28 days or less, but paid the deputies on a monthly basis because his computer calculated wages in intervals of one month.

The deputies filed suit against Sheriff Bonner and Coahoma County (collectively the "County") for back wages for overtime and liquidated damages under the FLSA. The County admitted miscalculation of overtime and tendered payment to the deputies. The deputies

refused the tender and disputed the amounts owed. At a bench trial, the district court awarded the deputies amounts close to the County's calculations, denied the liquidated damages claim and awarded attorney's fees of $4800.00.

III.

The deputies claim the district court erred in calculating their overtime pay, improperly denied liquidated damages under 29 U.S.C. § 260, and awarded inadequate attorney's fees. The County asserts the district court abused its discretion in allowing all deputies except Isaac Lee to file an amended notice of appeal. The County also contends that the deputies are not entitled to recover attorney's fees.

A. Notice of Appeal.

[1] Twenty-eight days after the court entered its final judgment a notice of appeal was timely filed. However, this notice of appeal listed only deputy Isaac Lee by name and used the term "et al." It did not name the other six deputies. Shortly after filing this notice of appeal, the deputies' counsel became aware of the Supreme Court's holding in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988), interpreting FED.R.APP.P. 3(c) to require that each appellant be listed by name in the notice of appeal. After the thirty day period allowed by FED.R.APP.P. 4(a)(1) for filing a notice of appeal had expired, the deputies moved for an extension of time to file a notice of appeal pursuant to FED.R.APP.P. 4(a)(5) and subsequently mailed an amended notice of appeal to the district court. They claimed that the failure to

list all the appellants in the original notice of appeal was due to excusable neglect. The district court granted their motion *ex parte* and designated the amended notice of appeal listing all seven appellants as filed pursuant to that order.

The County asserts that under *Torres* and the cases in this circuit which follow *Torres*, the original notice of appeal was insufficient to confer jurisdiction over any of the appellants except Isaac Lee. *See Barnett v. Petro-Tex Chemical Corp.*, 893 F.2d 800 (5th Cir. 1990); *Smith v. White*, 857 F.2d 1042, 1043 (5th Cir. 1989). Further, the County asserts that the district court abused its discretion in extending the time allowed for filing a notice of appeal because of excusable neglect, *see Allied Steel v. City of Abilene*, 909 F.2d 139, 142 (5th Cir. 1990), and by doing so *ex parte* when notice is expressly required under FED.R.APP.P. 4(a)(5).

The deputies admit the original notice of appeal was insufficient to perfect an appeal as to any plaintiff except Isaac Lee, but assert their motion to amend the notice of appeal at the outset of the appellate process distinguish *Torres*. They point to language in *Torres* which indicates the Court's decision might have been different had the petitioner Torres sought to amend the notice of appeal. *See Torres*, 108 S.Ct. at 2405. Because the deputies corrected notice of appeal filed under the extension provisions of Rule 4(a)(5) complied with the requirements of Rule 4(a)(3), we agree.

Within the time allowed by FED.R.APP.P. 4(a)(3), the defendants filed a Notice of Cross Appeal from the orders granting attorneys fees to the plaintiffs. Assuming that the effect of *Torres* on the initial

notice of appeal was to perfect an appeal only as to the plaintiff Isaac Lee, then the defendants' notice of cross appeal would become the "first notice of appeal" under Rule 4(a)(3) as to all other plaintiffs. *See In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1364 (9th Cir. 1987). Accordingly, Rule 4(a)(3) granted all plaintiffs 14 days from this initial timely notice of appeal by defendants to file their own notice with the court. Plaintiffs' amended notice of appeal filed two days after the defendants' notice of cross appeal is well within the time allowed by FED.R.APP.P. 4(a)(3). As a result, the plaintiffs not listed in the original plaintiffs' notice of appeal have filed a timely notice of appeal and need not justify their conduct under the excusable neglect standard of Rule 4(a)(5).

[2] This holding comports with Rule 4(a)(3)'s purpose to allow all parties an opportunity to see and respond to the actions of their adversaries. 9 J. Moore and B. Ward, *Moore's Federal Practice* § 204.11[1] (2d ed. Supp.1980). While the plaintiffs in this case would be taking advantage of this rule to remedy their own miscalculations rather than as a matter of strategy, appellants in another circumstance might legitimately decide to let one of their co-appellants proceed alone on appeal unless the appellee decided to file a cross appeal. *See North American Savings Ass'n v. Metroplex Development Partnership*, 931 F.2d 1073 (5th Cir.1991). If Rule 4(a)(3) did not authorize the amended notice of appeal here, then an appellee could wait until the last possible day to file a cross appeal thereby preventing any challenge by other, as yet uninvolved, parties. Giving effect to the

plaintiffs' amended notice of appeal under Rule 4(a)(3) in the circumstances of the present action does not distort the operation of the time limits for filing a notice of appeal under Rule 4. We do not reach or rule on the multiparty case in which limited appeals and cross appeals might leap-frog one another to expand the time for all parties to appeal for an unreasonable period.

B. Overtime Calculations.

The deputies claim that the district court made three errors in calculating the overtime pay due them under § 7(k) of the FLSA. They claim that the district court erred in calculating their pay on a weekly basis rather than using a 28-day work period, that the district court erred in concluding their meal breaks and three hour rest periods on long weekend shifts were not compensable.

[3] We will not disturb the district court's fact findings unless they are clearly erroneous. However, we review the district court's application of the FLSA *de novo*.

[4] Section 7(k) of the FLSA creates an exception to the standard wage and hour provisions of the FLSA.[1] It provides

---

[1]Section 7(k) states:

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if-

(1) in a work period of 28 consecutive

special compensation rules for public law enforcement and fire protection departments. Section 7(k) contains two structural concepts not found elsewhere in the FLSA: the "tour of duty" and the "work period." A tour of duty means a shift or "period of time during which an employee is considered to be on duty." 29 C.F.R. § 553.220. A work period "refers to any established and regularly recurring period of work which, under the terms of the [FLSA], cannot be less than 7 consecutive days nor more than 28 consecutive days." 29 C.F.R. § 553.224. Both the tour of duty and the work period impact the determination of compensable hours and

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> days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or
>
> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

overtime compensation under § 7(k) of the FLSA.

Under § 7(k)(1)(B), the Secretary of the Department of Labor has determined that the average number of hours worked by law enforcement employees in a 28 day period is 171. 29 C.F.R. § 553.230. Thus a law enforcement employee receives a regular wage for the number of hours worked in a particular work period that bears the same relationship to 171 as the number of days in the work period bears to 28. Such an employee is not entitled to overtime pay until the "number of hours worked exceeds the number of hours which bears the same relationship to 171 as the number of days in the work period bears to 28." 29 C.F.R. § 553.230. For example, if the work period is 28 days then a law enforcement officer receives a regular wage for the first 171 worked in the work period and overtime pay for all hours worked in excess of 171. Likewise, if the work period is 7 days then the officer receives regular pay for the first 43 hours worked in the work period and overtime pay for all hours worked above 43. *Id.*

[5] The deputies correctly claim that the district court erred in determining their overtime pay on a weekly wage basis rather than using the work period method set out above. In calculating the deputies' overtime pay the district court relied on 29 C.F.R. § 778.113(b) which requires set salaries covering more than a work week to be reduced to a work week equivalent. Consequently the district court calculated the deputies' overtime on a weekly wage basis. However, when Section 778 is used to calculate a § 7(k) employee's regular wage rate, the work

period concept is substituted for the term work week. 29 C.F.R. § 553.233. The district court's opinion makes no finding about the appropriate work period in this case. The deputies claim that the appropriate work period should be 28 days since each of the deputies was assigned to a 28-day rotating schedule. The County responds that the district court's calculations are equivalent to a finding of a 7-day work period. While a 7-day work period ultimately may be found to be proper on remand, we are unable to discern this from the court's opinion or the record. We are also unable to tell whether the district court calculated the overtime pay according to the ratio set out in 29 C.F.R. § 553.230 or simply used a 40-hour work week as a guide. Since overtime calculations under § 7(k) are tied to a specific number of hours worked in a given work period, a determination of the work period is an essential step in determining the overtime pay due an employee. The district court must make this determination in the first instance.[2]

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[2]In determining each deputy's hourly wage in a given work period, the district court should multiply the deputy's monthly salary by twelve to get a yearly salary, including a two week paid vacation to which each deputy is entitled. The district court should then divide the yearly salary by the number of work periods in a year. The court should then divide the sum by the number of regular hours which may be worked in that work period according to the ratio set out in 29 C.F.R. § 553.230. This will result in a determination of each deputy's appropriate hourly wage in the work period determined by the district court.

[6] The deputies also claim that the district court erred in concluding that their meal breaks were not compensable. They point out that § 7(k) requires a law enforcement employee to be completely relieved from duty during the meal period in order to exclude the meal period from the hours worked. Title 29 C.F.R. § 553.223 so provides. The meal period must be scheduled, occur at a regular time, and normally be thirty minutes or more. 29 C.F.R. § 785.19. The deputies argue that since their meal periods were on a "catch as catch can" basis and they were often required to cut their meal periods short and could be called back to duty at any time, the twenty minute meal periods were compensable. The district court found that the deputies' twenty minute meal breaks were bona fide meal periods and were not compensable time under § 7(k) of the FLSA because the deputies were allowed to go where they pleased during the break, would only radio out once they reached the place where they wished to eat and were called back only in an occasional emergency.

Section 553.223 of Title 29 C.F.R. provides an example of the time of meal break intended to be compensable under § 7(k) of the FLSA:

> [W]here law enforcement personnel are required to remain on call in barracks or similar quarters, or are engaged in extended surveillance activities (e.g. `stakeouts'), they are not considered to be completely relieved from duty and any such meal periods would be compensable.

The meal breaks of the Coahoma County deputies in no way resemble this example. It is not dispositive that the deputies could be called if an emergency arose and this contingency does not mean they remained on duty. Nor does the fact that their meal breaks were often shorter than thirty minutes make the breaks compensable. Since the deputies did not log off until they had arrived at their chosen eating place (and were therefor compensated for traveling to their destination), the usual thirty minute threshold is inapplicable. *See* 29 C.F.R. § 785.19. These findings support the district court's fact conclusion that the meal periods are not compensable.

[7] The deputies likewise claim that the district court erred in concluding that the rest breaks on the weekend long-shifts were not compensable. On weekends, several deputies would be required to work long shifts. The deputies would check in at 9:00 a.m. and would work until midnight. Since the shift was long, the deputies would be allowed a two hour rest break following the meal period. The deputies would usually return home and rest during the two hour break. The deputies argue that such rest breaks are required to be compensated under § 7(k) of the FLSA. They are correct.

Section 553.222(b) of Title 29 C.F.R. provides: "Where an employer has elected to use the section 7(k) exemption, sleep time *cannot* be excluded from the compensable hours of work where (1) The employee is on a tour of duty of less than 24 hours ..." (emphasis added). The weekend long-shifts in this case constitute tours of duty of less than 24 hours and the rest breaks at issue are clearly contemplated by the

regulation. The district court concluded that because the deputies could go where they pleased during the rest periods they were not entitled to compensation for that time. However, unlike the meal break analysis above, the regulations set out a firm rule. Patrolling law enforcement officials such as deputies naturally have freedom of movement. The fact that the deputies could rest where they chose cannot defeat the precise wording of the regulation. As a result, this time should be included in calculating both overtime hours and hours worked for purposes of determining the appropriate hourly wage.

C. Liquidated Damages.

The deputies claim that the district court erred in now awarding liquidated damages for the County's failure to comply with the overtime requirements of the FLSA. Their argument is two tiered. First, they claim that the district court erred in not ruling that Sheriff was an "employer" within the meaning of the FLSA. Second, the deputies argue that the district court should have found the Sheriff's actions denying overtime pay warranted liquidated damages under the FLSA. While the Sheriff was the deputies' employer under the FLSA, the district court did not abuse its discretion in refusing to award liquidated damages.

[8] An employer under the FLSA includes "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). The term employer includes individuals with managerial responsibilities and "substantial control over the terms and conditions of the

[employee's] work...." *Falk v. Brennan*, 414 U.S. 190, 194, 94 S.Ct. 427, 430, 38 L.Ed.2d 406 (1973). If an individual with managerial responsibilities is deemed an employer under the FLSA, the individual may be jointly and severally liable for damages resulting from the failure to comply with the FLSA. *See Donovan v. Grim Hotel, Inc.*, 747 F.2d 966 (5th Cir.) *cert. denied*, 471 U.S. 1124, 105 S.Ct. 2654, 86 L.Ed.2d 272 (1985).

[9,10] Sheriff Bonner clearly falls within the class of managerial personnel considered employers by the FLSA. Mississippi law allows a county sheriff operational control of the sheriff's department. MISS. CODE ANN. § 19-25-13 (Supp.1989). A sheriff has the power to "appoint one or more deputies ..., remove them at pleasure, and to fix their compensation, subject to the budget of the sheriff's office...." MISS. CODE ANN. § 19-25-19. The district court's opinion makes no finding concerning Sheriff Bonner's status as an employer under the FLSA. However, the absence of such findings does not affect the district court's discretionary refusal to award liquidated damages.

The FLSA provides for the payment of liquidated damages in an amount equal to the amount of compensatory damages. 29 U.S.C. § 216(b). Liquidated damages were originally mandatory any time a violation of the FLSA was found. However, in the Portal-to-Portal Act of 1947, Congress amended the FLSA to allow the district court discretion in awarding liquidated damages. 29 U.S.C. § 260. Section 260 provides:

> In any action ... to recover ... under the [FLSA], if the employer shows to the satisfaction of the court that such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation ... the Court may, in its discretion award no liquidated damages or award any amount thereof not to exceed the damages specified in Section 216 of [the FLSA].

[11] This court has previously held that § 260 invests the district court with two levels of discretion. *Peters v. City of Shreveport*, 818 F.2d 1148 (5th Cir.1987). If the district court finds that employer's action which violated the FLSA was taken in good faith, which good faith was supported by reasonable grounds for believing that the actions complied with the FLSA, it may choose not to award liquidated damages. *Id.* However, even if the district court determines that the employer's actions were in good faith and based on reasonable grounds, the court has discretion to award liquidated damages. *Id.* The dual and specific findings of good faith and reasonable grounds have been interpreted strictly by this court. *LeCompte v. Chrysler Credit Corp.*, 780 F.2d 1260, 1262-63 (5th Cir.1986); *Barcellona v. Tiffany English Pub, Inc.*, 597 F.2d 464, 466-67 (5th Cir.1979).

The County argues that this strict interpretation was impliedly overruled by the Supreme Court in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1985) and *Transworld Airlines, Inc. v. Thurston*, 469 U.S. 111, 113, 105

S.Ct. 613, 617-18, 83 L.Ed.2d 523 (1985). This assertion is incorrect. *McLaughlin* and *Thurston* dealt with the meaning of the term "willful" as it is used in the FLSA and related statutes. This term relates to the statute of limitations provisions which are not at issue in this case. As the Seventh Circuit explained in *Walton v. United Consumers Club, Inc.*, 786 F.2d 303 (7th Cir.1986), "[t]he *Thurston* standard does not apply to the doubling of damages under the FLSA ... because [§ 260] does not use the word `willful' and puts the burden on the defendant." *Id.* at 311. Nevertheless, even the stringent requirements of § 260 do not deprive the district courts of its board discretion to determine that an award of liquidated damages is not proper in a particular case.

The district court here listed several factors which contributed to the findings of good faith and reasonable grounds. The County sought the advice of its counsel in structuring a compensation plan which complied with the FLSA. After attending a seminar on the FLSA, the County's counsel and the chancery clerk devised a plan and consulted with the Department of Labor about its acceptability. The County relayed this plan to the Sheriff who did not implement it correctly. The only fact to which the deputies point that casts doubt on the district court's findings is the Sheriff's failure to keep records that would disclose the deputies' actual work times. This fact alone is not dispositive since radio logs were kept from which their work times could be discerned and work schedules were regularly posted and kept. The FLSA does not dictate that an employer keep their records in any particular form.

The district court did not abuse its discretion in refusing to award liquidated damages.

D. Attorney's Fees.

[12,13] The deputies claim that the district court's award of attorney's fees is inadequate, based on faulty methodology and constitutes an abuse of discretion. The County claims that, in light of the fact that the deputies recovered only approximately $400.00 more after a full bench trial than was offered in settlement negotiations, the district court abused its discretion in awarding any fees at all. We conclude that the deputies are entitled to attorney's fees and the issue must be remanded to the district court for further findings.

The FLSA authorizes the award of attorney's fees to a successful employee. 29 U.S.C. § 216(b). Section 216(b) provides in pertinent part: "The Court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant and the cost of the action." The County argues that because the deputies received only slightly more in awards as was offered in settlement they are not entitled to fees under § 216(b). However, § 216(b) makes no reference to the size of the recovery. The district court properly ruled that the deputies were the prevailing parties. Our conclusion that the deputies are entitled to further compensation for the rest periods during the long shifts reinforces this conclusion.

All deputies originally requested $40,000.00 in fees. The district court awarded a lump sum of $4,800.00 for all

deputies. In discounting the requested fees, the district court summarized the factors this court set out in *Halferty v. Pulse Drug Co.*, 821 F.2d 261 (5th Cir.1987) and only briefly related them to the facts of this case. The court did not discuss the appropriate loadstar amount. We have no way of discerning from the district court's order how the specific award of fees was reached. While the amount the district court awarded may ultimately prove to be an appropriate award for all deputies, the order appealed from is simply too vague to permit review on this record.

IV.

We conclude that the district court erred in determining the deputies' overtime pay on a weekly basis, erred in ruling that the deputies' rest breaks were not compensable, correctly determined that the deputies' meal breaks were not compensable, and did not abuse its discretion in refusing to award liquidated damages. We also conclude that the district court's order granting attorney's fees is insufficiently detailed to permit review. Accordingly, we AFFIRM in part, REVERSE in part, VACATE the district court's order granting attorney's fees, and REMAND the cause for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ISAAC LEE, ET AL.,	)	
	)	
Plaintiffs	)	
V.	)	NO. DC88-56-B
	)	
COAHOMA COUNTY, MS, ET AL.,	)	
	)	
Defendants	)	

MEMORANDUM OPINION

This cause comes before the court upon the motion of the plaintiffs for reconsideration of judgment pursuant to Fifth Circuit mandate. Upon consideration of the parties' memoranda, this court's previous opinion in the above styled action, and the appellate court's subsequent ruling, the court is prepared to rule.

On July 28, 1989, this court ruled in favor of the plaintiffs, Coahoma County deputy sheriffs, for unpaid overtime. The court denied the plaintiffs' claim for liquidated damages and held that certain time periods (rest and meal) were not compensable. On appeal, the Fifth Circuit affirmed in part, reversed in part, vacated in part, and remanded the cause back to this court. Lee v. Coahoma County, Miss., 937 F.2d 220, 228 (5th Cir. 1991). Specifically, the appellate court affirmed this court's ruling that meal time taken by the plaintiffs was not compensable; reversed this court's finding that the two-hour rest period taken by the plaintiffs on the weekend "long shift" was not

compensable; affirmed the court's finding that the plaintiffs were not entitled to liquidated damages; and vacated the court's ruling on the appropriate attorney fee award for lack of discussion of the appropriate loadstar amount. Although the Fifth Circuit took issue with the method of calculating the deputies' overtime compensation because the court did not make a finding of the appropriate "work period" prior to employment of 29 C.F.R. part 778, Lee, 937 F.2d at 224-25, it did not reverse this court's application of the formula found in 29 C.F.R. § 778.113 to calculate the plaintiffs' regular rate upon which overtime compensation was calculated by this court initially.[1] As will be discussed infra, the appellate court in effect modified this court's initial formula for calculation of the overtime compensation due the plaintiffs.

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[1]While this court followed § 778.113, it did not follow the dictates of § 553.233 which requires:

> The rules for computing an employee's "regular rate," for purposes of the Act's overtime pay requirements, are set forth in part 778 of this title. These rules are applicable to employees for whom the section 7(k) exemption is claimed when overtime compensation is provided in cash wages. However, wherever the word "workweek" is used in part 778, the words "work period" should be substituted.

29 C.F.R. § 553.233.

A. Appropriate Work Period

As it pertains to the proper methodology to use in conjunction with determining the correct amount of overtime compensation, the Fifth Circuit stated as follows:

> The deputies correctly claim that the district court erred in determining their overtime pay on a weekly wage basis rather than using the work period method set out above. In calculating the deputies' overtime pay, the district court relied on 29 C.F.R. § 778.113(b) which requires set salaries covering more than a work week to be reduced to a work week equivalent. Consequently, the district court calculate the deputies' overtime on a weekly wage basis. However, when section 778 is used to calculated a § 7(k) employee's regular wage rate, the work period concept is substituted for the term work week. 29 C.F.R. § 553.233. The district court's opinion makes no finding about the appropriate work period in this case. The deputies claim that the appropriate work period should be 28 days since each of the deputies was assigned to a 28-day rotating schedule. The county responds that the district court's calculations are equivalent to a finding of a 7-day work period. While a 7-day work period ultimately may be found to be proper on remand,

> we are unable to discern this from the court's opinion or the record.

937 F.2d 220, 224.

The evidence adduced in the course of the bench trial indicates that a twenty-eight day work period is the most appropriate work period designation in this case. The county's counsel devised a budget-neutral plan to take advantage of the § 7(k) exemption to the FLSA. In accordance with that plan, the deputies' compensation was changed from a salary to a wage basis with adjustment of the hourly rate. Counsel for the county conferred with the Sheriff and advised him that as long as the deputies were paid minimum wage or above for 171 hours and time and a half for all hours over 171 without reducing their then compensation, the county would be in compliance with the FLSA. In implementing the plan, the Sheriff estimated that each deputy worked approximately 245 hours per month with 171 of those hours compensable as straight time under the FLSA and 74 as overtime. While the overtime thus calculated was an estimate of the amount of hours the deputies worked in a month, it was not based upon actual hours worked. Thus, the county's "regular rate" determination was in error. Although the Sheriff and Chancery Clerk were aware of the work period concept under the FLSA, and discussed specifically the 28-day basis, the county went on a 30-day pay period since their computer was set up for a 30-day payroll. The Chancery Clerk testified that it was his understanding of the plan that the deputies would be given time off or "comp time" at their discretion to compensate for the difference between payment under a 28-day work period and the

30-day plan as actually implemented. The work schedules prepared by the Sheriff reflect that each deputy was scheduled to work a fixed number of hours changing each week on a regular four-week (28-day) rotating cycle. Although the parties disputed at trial the exact number of hours during this twenty-eight day cycle for which the deputies' monthly salary was intended to compensate, the court found that the monthly salaries as stipulated included intended compensation for a total of 245 hours per month.

B. Regular rate

This court's previous ruling employed § 778.113 or the "intended hours" method of calculating the plaintiffs' "regular" rate based upon the testimony of the defendants that the deputies' stipulated monthly salary included remuneration for 171 hours of straight time and 74 hours of overtime per pay period whether the deputies actually worked more or less hours per month. Thus, in applying § 778.113(a), the court used the total hours for which the deputies' salaries were intended to compensate or 245 in the calculation of their regular rate. However, by converting the deputies' monthly salary into a weekly wage, the intended hours-of-compensation figure was accordingly also reduced to reflect the intended hours of compensation per week. Thus, the figure 58.80 was arrived at as the number of hours for which the weekly wage (as converted) was intended to compensate.[2]

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[2]245 x 12 (number of months in a year) divided by 50 (number of weeks the deputies worked each year). District Court Memorandum

After pointing out the necessity of this court making an initial finding as to an appropriate work period and the substitution § 553.233 entails, the appellate court continued:

> We are also unable to tell whether the district court calculated the overtime pay according to the ratio set out in 29 C.F.R. § 553.233 or simply used a 40-hour work week as a guide. Since overtime calculations under § 7(k) are tied to a specific number of hours worked in a given work period, a determination of the work period is an essential step in determining the overtime pay due an employee. The district court must make this determination in the first instance.

Lee, 937 F.2d at 225. Following this paragraph, the Fifth Circuit dropped a footnote. This footnote (#2) provides the formula that the appellate court designates should be applied to determine the hourly rate per deputy. It states:

> In determining each deputy's hourly wage in a given work period, the district court should multiply the deputy's monthly salary by twelve to get a yearly salary, including a two-week paid vacation to which each deputy is entitled. The district court should then divide the yearly salary by the number of work periods in a year. The court should then

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Opinion, p. 8.

> divide the sum by the number of regular hours which may be worked in that work period according to the ratio set out in 29 C.F.R. § 553.233. This will result in a determination of each deputy's appropriate hourly wage in the work period determined by the district court.

Id. As is readily apparent, the appellate court's formula varies both from this court's previous formula (§ 778.113) as well as that formula as modified according to the dictates of § 553.233.[3]

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[3]With the necessary substitution, per § 553.233, § 778.113 would read in relevant part as follows:

(a) Weekly Salary. If the employee is employed solely on a weekly salary basis, his regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. If an employee is hired at a salary of $182.70 and if it is understood that this salary is compensation for a regular workweek (work period) of 35 hours, the employee's regular rate of pay is $182.70 divided by 35 hours, or $5.22 an hour, and when he works overtime he is entitled to receive $5.22 for each of the first 40 hours and $7.83 (one and one-half times $5.22) for each hour thereafter.

(b) Salary for periods other than workweek (work period). Where the salary covers a period longer than a workweek (work period), such as a month, it must be reduced to its workweek (work period) equivalent. A monthly salary is subject to translation to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A

> The plaintiff has submitted calculations for overtime hours based upon the appellate court's ruling and methodology contained in footnote #2. The defendants, on the other hand, continue to present calculations based upon two alternate formulas: (1) the formula used by this court in the initial memorandum opinion and cited first, or the § 778.113 "intended compensation method" with the work period substitution; and (2) the "all hours worked" scenario included in § 778.109.[4] Neither the plaintiffs nor the

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semimonthly salary is translated into its equivalent weekly wage by multiplying by 24 and dividing by 52. Once the weekly wage is arrived at, the regular hourly rate of pay will be calculated as indicated above.

Thus, the defendants argue that the formula for calculation of the regular rate is as follows:

Monthly Salary (MS) x 12 = Yearly Salary (YS)

YS divided by 13 (amount of work periods in a year) = amount of compensation paid for work period.

§ 778.113(b).

Next, 778.113(b) by its terms requires the next step to be application of the formula in (a) or:

salary (amount of compensation paid for work period) divided by number of hours which the salary is intended to compensate, in this instance 245 hours.

[4]With the § 553.233 substitution, § 778.109 would read as follows:

The "regular rate" under the Act is a rate per hour. The Act does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-

defendants questioned the applicability of § 778.113 to the facts of this case before this court or on appeal. Because of the county's failure to keep adequate records of the actual hours worked by the deputies, this case primarily focused upon the justified efforts of the plaintiffs in attempting to ascertain what hours they were being compensated for and specifically whether certain hours (rest and sleep time) were included in their monthly salary.[5]

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rate, salary, commission, or other basis, but in such case the overtime compensation due the employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek (work period).... The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment...in any workweek (work period) by the total number of hours actually worked by him in that workweek (work period) for which such compensation was paid.

Section 778.109 is the basic formula for calculation of the regular rate under the FLSA, and explicitly recognizes the necessity for basing any determination of the "regular hourly rate" on a determination of the actual hours worked by the employee in any given work week/period.

[5]Now that the appellate court has indicated that the rest period provided the deputies on the "long weekend shift" is compensable, overtime pay for such time will be required to the extent that its inclusion in the plaintiffs' compensable hours worked time causes that time to exceed the permissible 171 hours in any given 28-day work period for any given deputy. See 29 C.F.R. 553.231(b).

Previously, the plaintiffs' only dispute concerning this court's computation of the overtime rate centered upon the issue of what hours the Sheriff actually intended to compensate the deputies for in arriving at their monthly salary. The defendants, on the other hand, insist that since, strictly speaking, the appellate court did not formally reverse this court on the methodology to use in calculation of the deputies' overtime compensation, with the exception of the § 553.233 substitution of the term "work period," either this court's previous method used to calculate overtime due the deputies with the § 553.233 substitution or, alternatively, the methodology embodied in § 778.109 is permissible to apply on remand.

Specifically, the only difference between the two formulas is the appellate court's "number of regular hours which may be worked in that work period" divisor and this court's divisor of 58.80.[6] Per C.F.R. § 553.233, the number of hours that may be worked by law enforcement personnel under 7(k) before overtime compensation is due is 171 hours in a 28-day work period. Application of either formula begins with a yearly salary derived by multiplying the monthly salary (which in this case is

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[6]Were § 778.113 in its original form still applicable, this figure would be revised to 56.55 (rounded) insofar as the initial calculation was in error. 245 hours, the number of hours this court determined the plaintiffs' monthly salary was intended to compensate for, was multiplied by 12 to determine the total number of hours per year of intended compensation and then divided by 50 rather than the 52 weeks which the appellate court determined was appropriate.

stipulated) by 12 (months). That annual compensation is further divided by 13, the number of 28-day work periods per year. That sum thus determined is equivalent to the amount of compensation actually paid the plaintiffs per month. At this point, the appellate court's formula diverges from this court's initial methodology. According to the appellate court, that sum must further be divided by the "number of hours which may be worked in that work period according to the ratio set out in 29 C.F.R. § 553.233," Lee, 937 F.2d at 225 n.2, in this instance, 171 hours per 28 day work period. The result thus determined, however, is inflated to the extent it is based on and derived from the deputies' actual compensation (monthly salary) that includes payment at a straight time rate for 171 hours and payment at an overtime rate for at least 74 hours per month.[7]

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[7]By way of illustration only, taking plaintiff Dudley Lester's stipulated monthly salary of $1015.20, the disparity between rates via application of the appellate court's formula and the evidence adduced at trial can be better viewed when looking at the problem from an hours worked standpoint.

$1015 x 12 = $12,182.40 (annual compensation)

171 (number of hours that may be worked per 28-day period at straight time) x 13 (number of 28-day work periods in year) = 2,223 hours the county can compensate Lester at a straight time rate per year.

$1015.20 divided by 2,223 hours = a rate of $5.48 per hour.

This same rate can alternatively be derived by applying the Fifth Circuit's formula. No inflation would result if the plaintiffs' monthly compensation did not also include

It remains undisputed that the deputies were already compensated at a straight time regular rate that was above the applicable minimum wage when implemented for all hours worked up to the threshold 171 hours (number of hours that may be worked per 28-day work period in accordance with § 553.233) and a time-and-one-half rate for hours worked in excess of 171 for a total of 74 hours of overtime per pay period (30 days). The record indicates that the county computed the plaintiffs' "regular rate" initially before calculating the overtime rate. The regular rate includes all remuneration for employment paid to, or on behalf of, the employee, except payments specifically excluded by statute. 29 U.S.C. § 207(e). It is the hourly rate actually paid to the employee for the normal, non-overtime work week for which he is employed. 149 Madison Ave. Corp. v. Asselta, 331 U.S. 199, 204, modified, 331 U.S. 795 (1947). However, the plaintiffs' "regular rate" was not based on actual hours worked by the deputies. To that extent, the county's determination of their hourly rate violated the FLSA. See § 778.109, supra note 4, at 7. Such a method might have been justified had the county reached a "clear mutual understanding" with the deputies as to this rate calculation. See § 778.114 (agency regulation prescribing instance where employer may pay fixed salary for

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overtime compensation. However, the plaintiffs' annual compensation does include at least 962 more hours (74 x 13) compensated at 1.5 x an erroneous straight time rate. Thus, to exclude these hours for which the deputies were paid in determining an hourly rate provides an inflated rate of compensation.

fluctuating hours). The evidence, however, clearly negates this possibility hence the regular rate requires recalculation. While this court has some difficulty in understanding the Fifth Circuit's formula in light of the evidence adduced in this case because their formula, which is in effect a slight modification of this court's previous application of § 778.113, can be justified in relation to the affirmative commands of the FLSA, it will be utilized by this court on remand.

As earlier noted, the defendants' submission of the amount due the deputies for overtime compensation relies upon the § 778.113 method of computing the "regular rate". Disregarding the appellate court's formula, they continue to divide the sum equivalent to the plaintiffs' work period wage (monthly salary multiplied by 12 divided by 13) by 245 hours to determine the plaintiffs' regular rate. This method, however, violates a basic precept of the FLSA and the rule in Asselta that prohibits inclusion of overtime hours in the calculation of the plaintiffs' regular rate. Accordingly, it must instead be divided by 171, the number of hours that may be worked in a given 28-day period before overtime compensation is due. Once that figure is determined, multiplying that rate by 1.5 will provide the applicable overtime rate for all hours worked over 171 per 28-day period. 29 C.F.R. 778.107; 29 C.F.R. § 778.113(a).

The court is not unmindful of the severe impact to the county resulting from recalculation of the plaintiffs' regular rate per the appellate formula; nor is it equitable to allow recalculation without also adjusting the amount finally determined due and owing these plaintiffs for overtime hours in proportion to the

amount the county already paid the plaintiffs based upon an erroneous regular rate. That rate is an actual fact included in the record.[8] Therefore, the court also holds that the defendants are entitled to offset the plaintiffs' final recovery for each hour over 171 per 28-day work period (hour for hour) by the amount actually paid to the plaintiffs to the extent compensation does not exceed 74 hours per 28-day period. Stated another way, the differential rate calculated by subtracting the rate actually paid (based on the erroneous straight time rate) from the new overtime rate (as determined above) will be the rate of overtime compensation for each hour the deputies actually worked which exceeds 171 per 28 day period. To the extent that there are hours which exceed 74 per 28-day period, these hours must of course be paid at the new overtime rate or 1.5 times the correct "regular rate."

C. Compensable Hours

Finally, the court is faced with a problem that all but precludes handling this case in one memorandum opinion after the applicable work period is found and the proper formula determined. Since neither party can now agree as to the amount of hours actually worked by the deputies after inclusion of the time found compensable by the appellate court, this court is faced with either appointing a special master to make that determination or directing that the parties come back to court and put on evidence as to the time actually worked. This court has no desire to apply scarce judicial resources to solve this problem

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[8]Plaintiffs' Exhibit P-23

which could most expediently be resolved through agreement and stipulation by the parties as was done earlier in this case. Accordingly, the court will give the parties thirty (30) days in which to confer and attempt to reach agreement on this matter. It appears to the court that, in view of the previous stipulation reached earlier in this case and the clear mandate of the appellate court adding compensable time only in the case of the long week-end shifts, the problem should be easily resolved. If no agreement is reached within this time period, however, the court will appoint a special master to determine the exact number of hours worked per designated 28-day work period with costs thereof to be borne equally by the plaintiffs and the defendants.

The attorney fees issue will be addressed subsequently.

An order in conformance with this memorandum opinion will issue accordingly.

THIS, the 19th day of October, 1992.

/s/
JUDGE NEAL B. BIGGERS, JR.
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ISAAC LEE, ET AL.,	)	
	)	
Plaintiffs	)	
V.	)	NO. DC88-56-B
	)	
COAHOMA COUNTY, MS, ET AL.,	)	
	)	
Defendants	)	

ORDER

This cause comes before the court upon the defendants' motion for reconsideration of this court's October 19, 1992 ruling in light of the Fifth Circuit's second amended mandate of March 4, 1993. Upon consideration of the motion, the court finds the defendants' motion well taken and the same will be granted. However, because of the continuing dispute between these parties as to exactly how many hours the deputies' monthly salary was intended to compensate for, and because the court has previously made it clear that no evidence in the record indicates the parties had reached an understanding as to that figure, the court will not reinstate its original method of calculating the regular rate per 29 C.F.R. § 778.113.

The Fifth Circuit's second amended mandate requires little interpretation to arrive at the correct method of calculating the deputies' hourly wage for purposes of determining the correct overtime rate. 29 C.F.R. 553.230 does not purport to set out a methodology to calculate "regular rate." Section 553.230 sets forth the rules

regarding maximum hours that employers seeking the 7(k) exemption may pay employees in law enforcement and fire protection at a straight time (nonovertime) rate. Instead, part 778 sets out the rules for computing the "regular rate," as recognized by § 553.233. Section 778.109 is, in this court's opinion, the correct methodology to employ in arriving at that rate in view of the peculiar circumstances of this case.

It is beyond peradventure that the regular rate must be based upon the number of hours actually worked by the deputies per 28-day period. It matters not that the deputies' monthly salaries (as stipulated) included payment for overtime hours worked. That figure may still be used to arrive at the correct regular rate per deputy per 28-day period.[1] See Zumerling v. Devine, 769 F.2d 745, 752 (Fed. Cir. 1985). The defendants have previously submitted overtime payment calculations based upon the all-hours-worked scenario embodied in § 779.109. However, since the court is not aware of a stipulation having yet been reached by the parties regarding the actual number of hours worked with the inclusion of time found compensable by the appellate court, the parties are again directed to confer on this point and advise the court as to this issue.

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[1]The court has already made it clear that the County violated the Fair Labor Standard's Act for it's initial calculation of a regular rate that was based upon artificial hours worked. That point is of little relevance to this issue, namely arriving at a correct amount of overtime compensation due these deputies now.

Accordingly, it is ORDERED:

That the defendants' motion for reconsideration is GRANTED;

That this court's October 22, 1992 opinion is VACATED;

That the correct method to calculate the deputies' regular hourly rate per work period is:

Monthly Salary x 12 months = Yearly Salary;

Yearly Salary divided by 13 = 28-Day Work Period Compensation;

28-day Work Period Compensation divided by number of hours actually worked by deputy per that Work Period = regular hourly rate.

That the correct overtime rate per 28-Day Work Period is:

.5 x regular hourly rate for hours worked in excess of 171 per 28-day Work Period.

1.5 x regular hourly rate for hours worked in excess of 245 hours per 28-day Work Period.

THIS, the 18th day of May, 1993.

/s/
JUDGE NEAL B. BIGGERS, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7480

ISAAC LEE, RANDY STEWART, DAVID RYBOLT, DANNY HILL,FLOYD WILLIAMS, SAMMY FLOWERS,and DUDLEY LESTER

Plaintiffs-Appellants,

v.

COAHOMA COUNTY, MISSISSIPPI and JESSE D. BONNER,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Mississippi
(2:88cv56-B-O)

Before WISDOM, KING and DUHÉ, Circuit Judges.

PER CURIAM:°
AFFIRMED. See Local Rule 47.6.

°Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burden on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

29 Code of Federal Regulations
(July 1, 1987):

§778.114 Fixed salary for fluctuating hours.

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such

hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).

(c) The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full

schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

29 United States Code:

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions. (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.
(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act [29 USCS §§ 201 et seq., generally; for full classification, consult USCS Tables volumes] by the Fair Labor Standards Amendments of 1966–

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966 [Feb. 1, 1967],

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

(k) Employment by public agency engaged in fire protection or law enforcement activities. No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) [29 USCS § 213 note] in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours

(or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.